



JOHN CORNYN

January 22, 2001

Ms. Elaine S. Hengen  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2001-0218

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143426.

The City of El Paso (the "city") received a written request for records pertaining to an automobile accident involving a police car. You state that the city has released some responsive information to the requestor. You contend, however, that the remaining information at issue is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, and 552.130 of the Government Code. You have submitted to this office as being responsive to the request representative samples of records from an internal affairs investigation ("Exhibit B"), a representative sample of records held by the city attorney's office<sup>1</sup> ("Exhibit C"), and photographs of one of the automobiles involved in the traffic accident ("Exhibit F").

Because section 552.103 is the more inclusive exception, we will discuss it first. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas*

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision No. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

*Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

We have reviewed your arguments under section 552.103 and the documents at issue. We conclude that you have met your burden in establishing that litigation against the city regarding the traffic accident was reasonably anticipated on the date the city received the records request. We further conclude that the information at issue "relates" to that litigation. The city therefore may withhold the information contained in Exhibits C and F pursuant to section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note, however, that Exhibit B consists of a report of a completed internal affairs investigation. Section 552.022(a) of the Government Code provides in relevant part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

One such category of information expressly made public under section 552.022(a) is "a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 . . . ." Gov't Code § 552.022(a)(1). You state that the internal investigation reached a final outcome. Accordingly, the records of the internal affairs investigation fall under section 552.022(a)(1). Therefore, as prescribed by section 552.022(a), the records represented by Exhibit B must be released to the requestor except to the extent they are made confidential under other law or are protected from public disclosure under section 552.108. Section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022(a).<sup>2</sup> We therefore must address the applicability

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. Section 552.103 does not implicate third party rights and is waivable by a governmental body. Open Records Decision No. 542 (1990).

of the confidentiality provisions and the section 552.108 arguments you have raised with regard to Exhibit B.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Portions of Exhibit B pertain an investigation of an alleged injury to a child. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We agree that the portions of Exhibit B that you have identified come within the scope of section 261.201 of the Family Code. You have not indicated that the city has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the requested documents are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the city must withhold the information we have marked pursuant to section 552.101 of the Government Code as information made confidential by law.

Exhibit B also contains a “Peace Officer Accident Report.” The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change. *See* Act of

May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.<sup>3</sup> In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.<sup>4</sup>

Section 47(b)(1) of article 6701d provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

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(D) a person who provides the Department or the law enforcement agency with two or more of the following:

(i) the date of the accident;

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<sup>3</sup>Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. See Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. See Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

<sup>4</sup> Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. See Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. See Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. Gov't Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

(ii) the name of any person involved in the accident; or

(iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.<sup>5</sup> Under this provision, a law enforcement agency employing a peace officer who made an accident report “is required to release” a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the city with the requisite information. Thus, the city is required to withhold the accident report under section 47(b)(1) of article 6701d, V.T.C.S. in conjunction with section 552.101 of the Government Code.

As noted above, section 552.101 also protects information deemed confidential by court decision. You have identified one of the documents contained in Exhibit B that consists of the criminal history of a witness to the traffic accident. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Similarly, open records decisions issued by this office acknowledge this privacy interest. *See* Open Records Decision Nos. 616 (1993), 565 (1990). Accordingly, we conclude that the city must withhold on privacy grounds the compiled criminal history information in conjunction with section 552.101.

You next contend that certain portions of documents contained in Exhibit B are excepted from public disclosure under section 552.108 of the Government Code because release of the information “would endanger the lives and safety of officers.” Section 552.108(b)(1) excepts from public disclosure an “internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution.” After reviewing the information at issue, we agree that the release of some of the information you highlighted would interfere with law enforcement. We have marked the information the city may withhold pursuant to section 552.108. The remaining information you have marked must be released.

Exhibit B contains the home address of a city police officer. Section 552.117(2) of the Government Code requires the city to withhold all information that relates to, among other things, the home address of a peace officer as defined by article 2.12, Code of Criminal

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<sup>5</sup>We note that the text of amended section 47 of article 6701d is not found in Vernon’s Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 1995 Legislature at chapter 894, section 1.

Procedure. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We agree that the city must withhold the police officer's home address pursuant to section 552.117(2).

Finally, Exhibit B contains certain driver's license, VIN, and license plate numbers. Section 552.130(a)(1) of the Government Code requires the city to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the city must withhold Texas driver's license numbers pursuant to section 552.130(a)(1) of the Government Code. Also, section 552.130(a)(2) of the Government Code requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Consequently, the city must withhold all license plate numbers contained in the records at issue pursuant to section 552.130(a)(2).

In summary, the city may withhold Exhibit C and Exhibit F pursuant to section 552.103 of the Government Code. However, pursuant to section 552.022(a)(1), the city must release Exhibit B in its entirety, with the following exceptions. The city may withhold the information we have marked as excepted under section 552.108(b)(1). Additionally, the city must withhold information pertaining to an investigation of an injury to a child pursuant to section 261.201 of the Family Code, the Peace Officer Accident Report pursuant to article 6701d, V.T.C.S., the compiled criminal history information pursuant to the common law right of privacy, the peace officer's home address pursuant to section 552.117(2) of the Government Code, and Texas driver's license numbers, VIN numbers, and license plate numbers pursuant to section 552.130 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

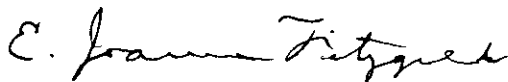
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/RWP/seg

Ref: ID# 143426

Encl. Submitted documents

cc: Mr. Ace Bole  
KVIA-TV  
4140 Rio Bravo  
El Paso, Texas 79902  
(w/o enclosures)